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No. 84-1417

In The

Supreme Court of the United States

October Term, 1984

San Jose Unified School District, Charles Knight, individually and as District Superintendent of the San Jose Unified School District; Neil H. Geier, Jr., Elizabeth J. Allen, Edwin P. Jones, Jr., Mary K. McCreath, and Donald L. Raimondi, individually and as members of the Board of Education of the San Jose Unified School District,

Petitioners,

vs.

Arnulfo M. Diaz and Socorro Diaz, as the parents and next friends of Fernando Diaz, Miguel A. Diaz and Juan F. Diaz; Jose Vasquez, as the parent and next friend of David Vasquez, individually and on behalf of all other persons similarly situated,

Respondents.

On Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In their petition to this Court for a writ of certiorari to review the opinion and judgment of the Court of Appeals for the Ninth Circuit, petitioners have concocted arguments unrelated to the actual holdings of the appellate court; in so doing, they have mischaracterized both the opinion and what they deem to be its effect on school desegration jurisprudence. These attempts do not withstand scrutiny.

Respondents submit this brief in opposition, not so much because the Ninth Circuit's opinion needs support—it speaks for itself—but rather to ensure that silence is not deemed acquiescence.

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STATEMENT OF THE CASE

This case is over thirteen years old and has generated five written opinions involving seventeen federal judges. See Pet. App.

On November 4, 1971, this lawsuit was instituted in the United States District Court for the Northern District of California on behalf of all Spanish-surnamed students enrolled in the San Jose Unified School District and their parents, alleging that petitioners, the San Jose Unified School District ("District"), its Superintendent, and members of its Board of Education ("Board") were operating a segregated public school system in violation of the Equal Protection Clause of the Fourteenth Amendment (U.S. Const. amend XIV, §1) and 42 U.S.C. §1983 (1982).

Jurisdiction in the district court was asserted via 28 U.S.C. §§1343(3) and 1343(4) (1982).

At the time the complaint was filed, respondents sought a temporary restraining order to prevent construction of certain schools. *Diaz* I, Pet. App. F, A-111. On November 11, 1971, an order issued prohibiting construction of all but two of the schools pending a hearing on a preliminary injunction. *Id.* Respondents' motion for a preliminary injunction was denied in January, 1972. *Diaz* I, Pet. App. F, A-112. In its opinion denying the injunction, the district court expressly refused to sanction the ethnic imbalance found to exist within the District and expressed the hope that the order would not discourage any efforts to alleviate the imbalance. Notwithstanding the district court's admonition, and in disregard of the recommendations of a task group established to deal with the rebuilding issue which the district court found would have reduced the imbalance, the Board decided to rebuild most of the "Field Act" schools on their original sites. *Diaz* V, Pet. App. A, A-15-16, citing *Diaz* I, [Pet. App. F, A-152]. Trial took place in July and August, 1974, and final argument was heard in April and May, 1975. The district court entered judgment for petitioners. *Diaz* I, Pet. App. F, A-161.

In its opinion, the district court found that the District was markedly imbalanced and that the Board maintained the imbalance by, inter alia, rebuilding the Field Act schools on site and adhering to its "neighborhood school policy." *Diaz* I, Pet. App. F, A-148. Although it also found that the faculty and staff were intentionally assigned schools on the basis of race, *Diaz* I, Pet. App. F,

A-156, the district court concluded the petitioners did not act with segregative intent. *Diaz* I, Pet. App. F, at A-161.

Respondents appealed and oral argument was heard before a three-judge panel of the Ninth Circuit on July 11, 1978. In early 1979, the Court of Appeals vacated submission of the appeal pending the Supreme Court's decisions in two Ohio cases. The Supreme Court's decisions in *Columbus Board of Education v. Penick,* 443 U.S. 449 (1979), and *Dayton Board of Education v. Brinkman,* 443 U.S. 526 (1979), issued on July 2, 1979, and the parties to the instant litigation were ordered to brief the issue of the Ohio cases' impact, if any, on the case at bench. The matter stood submitted on August 13, 1979, and on November 5, 1979, the Ninth Circuit vacated the district court's judgment and remanded the case in light of the Ohio cases and its own opinion. *Diaz* II, Pet. App. E, A-100-109.

The Ninth Circuit noted that inasmuch as both sides had presented evidence on the issue of segregative intent, it was not faced with the issue of whether a prima facie case had been made out. *Diaz* II, Pet. App. E, A-106 n.1. The remand was ordered because of the district court's apparent view that a neighborhood school policy could serve as a complete defense to a charge of discriminatory intent. *Diaz* II, Pet. App. E, A-109. The Ninth Circuit made clear that adherence to a neighborhood school policy is "no more than circumstantial evidence that bears upon the existence or nonexistence of segregative intent." *Diaz* II, Pet. App. E, A-108.

On remand, the district court denied respondents' motion to introduce additional evidence, but ordered rebriefing and oral argument. *Diaz* V, Pet. App. A, A-3. The district court issued its second opinion, again denying relief to respondents. *Diaz* III, Pet. App. D, A-99.

On appeal by respondents, a divided panel of the Ninth Circuit affirmed. *Diaz* IV, Pet. App. C. Respondents again appealed and a limited en banc panel of eleven judges of the Ninth Circuit reversed and remanded. See *Diaz* V, Pet. App. A, A-31. The Ninth Circuit, following *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), stated that its careful review of the record convinced it that the district court's finding (an absence of segregative intent) was clearly erroneous. *Diaz* V, Pet. App. A, A-6. The Ninth Circuit reaffirmed its earlier determination that "adherence to a neighborhood school policy is not by itself dispositive of segregative intent." *Diaz* V, Pet. App. A, A-7. It also made clear that it was not holding that a *de facto* segregated district must abandon its neighborhood school policy, *id.,* rather, it noted that in this case the petitioners' responses to choices related to siting, construction, the use of portables, and others, led invariably to enhanced segregation, and, in light of the requirement grounded in *Village of Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252 (1977), that the totality of the facts and circumstances be investigated, the district court was wrong. *Diaz* V, Pet. App. A, A-9, A-28-31.

The petition for a writ of certiorari followed.

———o———

REASONS FOR DENYING THE WRIT

Petitioners advance three issues to persuade this Court to grant its petition. As will be explained below, the first two, relating to the concept of the neighborhood school policy, should be rejected simply because *the first question has a clear answer and the second is not even an issue presented by this case.* Petitioners' third issue should not result in issuance of the writ because the Ninth Circuit understood and correctly applied the "clearly erroneous" doctrine. Thus this case is of purely local interest and would not serve as a vehicle for explaining any uncertain issues of law. Further, this Court would be forced to review a voluminous factual record that has already been examined by seventeen judges. These, and other, reasons are examined in detail below.

I. The Ninth Circuit's Opinions Concur On The Principle That A Neighborhood School Policy Is Not- Unconstitutional In Concept; Petitioners' Cynical Attempt To Characterize This Case As Sounding The Death Knell Of Neigborhood Schools Is Disingenuous And Misleading.

A. The Ninth Circuit considered a neighborhood school policy to be only relevant evidence to be examined in light of all the surrounding circumstances. The opinion has no implications for neutral, evenly-applied neighborhood school policies.

In both *Diaz* V and its precursor, *Diaz* II, the Ninth Circuit made its view of the relevance of a neighborhood school policy quite clear.

In *Diaz* II, the court recognized that the respondents relied solely on their "consistent adherence to a neighbor-

hood school policy, which was racially neutral." *Diaz* II, Pet. App. E, A-105. This reliance is misplaced, said the court, because "we do not believe that a neighborhood school policy, no matter how consistently followed, can be a determinative fact in proving the ultimate fact of forbidden purpose." *Id.* Indeed, we were told: "Strict adherence to a neighborhood policy is no more than circumstantial evidence that bears upon the existence or nonexistence of segregative intent." *Diaz* II, Pet. App. E, A-108.

Lest there be any confusion that the court was NOT opposed to neighborhood education on constitutional grounds, we were told that a neighborhood school policy is not constitutionally suspect. *Diaz* II, Pet. App. E, A-106.

This language and holding was reaffirmed unmistakably by the Ninth Circuit in *Diaz* V. The court reiterated that adherence to a neighborhood school policy is not dispositive of the intent issue, but merely relevant to that issue. *Diaz* V, Pet. App. A, A-7, citing *Diaz* II.

In light of these statements of law, it is clear the answer to petitioners' first "question presented" is that an inference of segregative intent may be drawn from the existence of a neighborhood school policy, as it has been here. But such an inference need not be drawn—and in an appropriate case an inference of integrative intent might well be required. Which inference, if any, is drawn must depend on all the facts and circumstances surrounding the creation and implementation of the policy.

The Ninth Circuit has never held that an inference of segregative intent arises automatically whenever even a neutral, non-manipulated neighborhood policy has been put into play; petitioners have advanced an issue not pre-

sented by this case. (Of course, the school policy here was anything but neutral.)

Contrary to the contention of petitioners, the Ninth Circuit did not hold that "the import of a neighborhood school policy is simply that students be required 'to attend school within neighborhood attendance areas.'" Pet. at 15, quoting *Diaz* V, Pet. App. A, A-7. The Ninth Circuit understood that petitioners' neighborhood school policy "requires students to attend the school nearest their homes", *Diaz* V, Pet. App. A, A-6, and in its opinions explained that such a policy "'does not have constitutional implications one way or the other without a penetrating examination of the complete context in which the neighborhood policy was initially applied and subsequently enforced.'" *Diaz* V, Pet. App. A, A-7, quoting *Diaz* II, [Pet. App. E, A-106].

Petitioners contend that a "arbitrary and wooden" view of the neighborhood school policy affected the appellate court's findings, Pet. at 15, but the district court itself recognized that "[n]ot only is the selection of sites and the size of schools not dictated by a neighborhood school policy in and of itself, but these decisions can play a crucial role themselves in defining the nature and make-up of a neighborhood." *Diaz* III, Pet. App. D, A-69-70.

The Ninth Circuit found that although the Board was presented with numerous opportunities to ameliorate segregation in the District, most of which would not have threatened the neighborhood school policy, "[t]he Board consistently selected the more segregative alternative." *Diaz* V, Pet. App. A, A-9.

B. The Ninth Circuit correctly interpreted this Court's holdings in Dayton and Columbus as allowing an inference of segregative intent to arise from foreseeable and forseen segregative effects of official actions.

Petitioners' second "question presented" is an even more blatant attempt to infect the Ninth Circuit's opinion with holdings that are not to be found there. This second question asks whether a school district is forbidden as a matter of law from making decisions with foreseeable and foreseen segregative consequences lest it automatically be found to have acted with segregative intent. See Pet. at i.

The Ninth Circuit made quite clear, consistent with this Court's holdings, that the answer is no. The Ninth Circuit explicitly acknowledged that "proof that the segregative effects of a decision were foreseeable is not to be taken, as a general proposition, to make out a *prima facie* case of segregative intent, nor does it routinely shift the burden of persuasion to the defendants." *Diaz* V, Pet. App. A, A-4, citing *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 536 n.9 (1979). Such evidence is merely relevant. *Id.*

Petitioners obviously are attempting to create issues which do not exist in order to interest this Court in reviewing a decision they do not like. Respondents are confident this ploy will not succeed.

Petitioners complain that the Ninth Circuit put misplaced reliance on a passage in *Columbus* "in which this Court was discussing the affirmative duty to remedy the effects of a prior constitutional violation, rather than the

elements of a prima facie case of segregative intent." Pet. at 13. In fact, the discussion concerned findings of segregative intent based upon the Columbus School Board's actions since the 1954 *Brown* I [*v. Board of Education*, 347 U.S. 483 (1954).] decision. *Columbus*, 443 U.S. at 461-464.

Among those actions said in *Columbus* to infer segregative intent were segregative faculty assignments, school site selections with the foreseeable and anticipated effect of maintenance of segregated schools, and the fact that the State Board of Education and community groups had called attention to the problem of segregation and made recommendations which were ignored by the Columbus Board of Education. *Columbus*, 443 U.S. at 462-463, and 463 n.12 (1979).

These acts and omissions may have been given added weight in light of the *Brown* I decision. However, lack of an affirmative duty to desegregate does not render such findings without force in inferring intent to segregate. *See Diaz* III, Pet. App. D, A-60-62.

Moreover, in the case at bench there was a duty under state law to alleviate segregation in schools, no matter what the cause. *Diaz* V, Pet App. A, A-10-12. Even the dissenting members of the Court of Appeals conceded that "[i]naction in the face of an affirmative duty to desegregate may suggest a higher probability of discriminatory intent than does inaction when no such duty exists." *Diaz* V, Pet. App. A, A-33, (Choy, J., *dissenting.*)

The Ninth Circuit recognized that petitioners' knowledge of the segregative effect of their actions was not necessarily determinative of segregative intent. That court

therefore undertook to focus on "the historical background and specific sequence of events leading up to the Board's actions maintaining or exacerbating ethnic imbalance in district schools." *Diaz* V, Pet. App. A, A-5, citing *Arlington Heights*, 429 U.S. at 267-268.

II. Petitioners' Exaltation Of Its Neighborhood School Policy Completey Ignores The Other Aspects Of The Case, Which As A Totality, Firmly Convinced The Limited En Banc Panel Of The Ninth Circuit That, Viewing The Record As A Whole, And Accepting The District Court's Underlying Factual Findings, A Mistake Had Been Made.

Petitioners accuse the Ninth Circuit of adopting a "myopic view of neighborhood education." Pet. at 16. Ironically, it is petitioners who blindly fail to comprehend actions unjustified by the neighborhood school policy which give rise to inferences of segregative intent.

The Ninth Circuit found that not only was the Board award of segregation in the District, but also of the duty under state law to desegregate, no matter what the cause of the segregation. *Diaz* V, Pet. App. A, A-9-10. Because state law held desegregation to be "of overriding educational importance", *Diaz* V, Pet. App. A, A-13, failure to comply with state law cannot be logically justified by invocation of a neighborhood school policy as a defense. Obviously, failure to comply with state law has nothing necessarily to do with the existence or nonexistence of a neighborhood school policy. It has been held elsewhere that the rejection by a school board of desegregation pro-

posals when a state desegregation requirement exists is probative of segregative intent. *Morgan v. Kerrigan*, 509 F.2d 580, 585 (1st Cir., 1974), *cert. denied* 421 U.S. 963 (1975).

However, the Board represented that it was taking steps to comply with state law, while accomplishing nothing. The Board assured the State that the resiting of Field Act schools would be used in such a way as to improve ethnic balance, but the rebuilding maintained the imbalance in the District. *Diaz* V, Pet. App. A, A-22, *Diaz* I, Pet. App. F, A-152. The citizens' committee, QUEST, was appointed by the Board, in response to an official state notification of racial imbalance, with a mandate to study that problem and suggest solutions. *Diaz* I, Pet. App. F, A-140. This group was cited by the Board as indicative of the progress being made toward integration. Although the final report by QUEST included several voluntary programs, none were ever adopted. *Id.* On the whole, the Court of Appeals found that

> [d]espite its recognized duty to take affirmative steps to desegregate, the Board continued to justify actions that maintained segregation by reference to its neighborhood school policy. The Board's stubborn adherence to this policy in the face of clearly established state law holding desegregation to be a matter of overriding educational importance suggests that the Board was motivated, at least in part, by a desire to avoid desegregation rather than a sincere commitment to the educational benefits of neighborhood schools.

Diaz V, Pet. App. A, A-12-13.

The Board made a number of other decisions relevant to the issue of segregative intent. These decisions were either unjustified by, inconsistent with, or completely irrelevant to, a neighborhood school policy.

The District admitted that it intentionally assigned faculty and staff to schools on the basis of race. *Diaz* V, Pet. App. A, A-19. Neither the district court nor the Court of Appeals considered this practice legal. *Diaz* V, Pet. App. A, A-19-20, *Diaz* III, Pet. App. D, A-91-92. Recognizing that "[a] discriminative pattern of assignment of faculty and staff is among the most important indicia of a segregated school system", *Diaz* V, Pet. App. A, A-19, citing *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18 (1971), the Court of Appeals considered the intentionally segregative practice to be evidence of segregative intent. *Diaz* V, Pet. App. A, A-20.

In 1974 the Board made a blatant, arbitrary departure from its neighborhood school policy. Acceding to the demands of parents of Anglo children at two junior high schools that their children be relieved of double sessions, the Board decided to allow those children to transfer out of their attendance areas. The decision was rescinded on advice of counsel that it may be viewed adversely in that the students could have been transferred to predominately Hispanic schools. The Court of Appeals agreed with counsel's advice and reasoned that the implication of segregative intent was undiminished by the later recission. *Diaz* V, Pet. App. A, A-20-21.

Although double sessions were recognized as being educationally disadvantageous, students in the southern

part of the District were kept in overcrowded schools rather than being transferred to undercapacity schools in the north. *Diaz* V, App. A, A-19. Students at a predominately Hispanic school were kept on double sessions in spite of the availability of room at a predominately Anglo school only one mile away. *Diaz* V, Pet. App. A, A-16-17.

The Board made another notable departure from its neighborhood school policy. Students from the Little Orchard neighborhood, which was nearly all Spanish-surnamed, were forced to attend a school with a predominately Spanish-surnamed population, even though they lived closer to a school which was predominately Anglo. *Diaz* V, Pet. App. A, A-17. The Ninth Circuit found that these departures from the neighborhood school policy reflected the Board's willingness to forego the policy in order to maintain segregation. *Diaz* V, Pet. App. A, A-21.

The downtown junior high schools were restructured from three-year to two-year schools. The restructuring resulted in one feeder system for the predominately Hispanic area, and another for the predominately Anglo area. This transfer also resulted in ethnic imbalance at one of the few balanced schools in the District. *Diaz* V, Pet. App. A, A-15. This restructuring is a classic example of one way in which a "neutral" neighborhood school policy may be used to maintain or exacerbate segregation. *See Diaz* III, Pet. App. D, A-66, citing *Swann*, 402 U.S. at 20-21.

Respondents steadfastly refused to allow busing for integration, although busing within the District was widespread. *Diaz* V, Pet. App. A, A-18. Indeed, seventy-two percent of the schools within the District used buses for

transportation within attendance areas and almost one-third of the students were bussed daily. *Id.*

Particularly telling is the fact that the District refused to follow the QUEST recommendation that voluntary busing be implemented. This board decision cannot be explained with reference to any sort of neighborhood school policy. It is, respondents contend, inexplicable except upon racial grounds, especially when District-commissioned studies showed that busing involving only one-sixth of the District's students would have integrated the District. *Id.*

It was clear to all parties that two-way busing would be a necessary ingredient of any desegregation plan. *Diaz* III, Pet. App. D, A-84-85. The district court found that the respondents' intransigence was "particularly disturbing" when coupled with acts and omissions in other areas relative to the District's imbalance. *Id.* The Ninth Circuit was clearly correct in deciding that "The Board's use of buses for every purpose but integration . . . supports an inference of segregative intent." *Diaz* V, Pet. App. A, A-18.

The foregoing discussion illustrates that there is much more than adherence to a neighborhood school policy involved in this litigation; respondents' announcement of the death of such a policy is highly exaggerated.

III. The Ninth Circuit's Analysis Comports With The Letter And Spirit Of Fed. R. Civ. P. 52(A).

A. An appellate court is required to examine the facts of a case to determine whether clearly erroneous.

Under Fed. R. Civ. P. 52(a) (the Rule, or Rule 52), findings of fact made by a trial judge are to be set aside

by an appellate court only if those findings are found to be clearly erroneous. *United States v. United States Gypsum,* 333 U.S. 364, 395 (1948). This rule is intended to apply to all classes of findings. Fed. R. Civ. P. 52, Notes of Advisory Committee on Rules.

As interpreted by this Court, the entire evidence is to be examined and even if there is evidence to support the findings below, those findings are to be overturned if the reviewing court is left with a definite and firm conviction that a mistake had been made. *United States v. United States Gypsum,* 333 U.S. at 395.

The standard imposed by the Rule does not require that the appellate court be limited as it might be in reviewing the findings of an administrative agency or a jury. *Id.* Petitioners assert that "the Ninth Circuit interpreted Rule 52(a) as imposing no requirement of deference toward trial court findings of fact, and as authorizing revision of such findings whenever an appellate court has the 'firm conviction that a mistake has been committed.'" Pet. at 21, quoting *Diaz* V, Pet. App. A, A-6. It is in *exactly* the latter circumstance that findings of the trial court are to be set aside. This Court has recognized the value of deference to findings of the trial court, but also that "the clearly erroneous standard serves that purpose well." *Dayton,* 443 U.S. at 534, n.8. Not only is an appellate court allowed to set aside findings which are clearly erroneous, *but is has an unavoidable duty to do so. Id.*

B. The Ninth Circuit's opinion shows that it was thoroughly familiar with the record.

The Ninth Circuit made clear its acceptance of the district court's "comprehensive and accurate findings cover-

ing the significant historical facts". *Diaz* V, Pet. App. A, A-6. Respondents have never quarreled with the district court's underlying factual findings. See, e.g., *Diaz* III, Pet. App. D, A-67.

Petitioners now contend, however, that the Ninth Circuit was "unaware" of the record. They assert, for example, that the appellate court "simply overlooked" the trial court's finding that the assignment of faculty and staff was for "benign purposes". Pet. at 23, n. 21. An examination of the opinions of both courts plainly shows that they *agreed* that the racially-based assignments were illegal and the assignment decision was not based on some neutral, non-race related purpose, such as providing Spanish-fluent teachers for Spanish-speaking students. *Compare Diaz* V, Pet. App. A, A-19-20, *with Diaz* III, Pet. App. D, A-91-92.

Indeed, the Ninth Circuit's opinion shows that the court was very well aware of the record. For example, the discussion of QUEST by the Court of Appeals is extremely detailed and utilizes material directly from the record. *Compare Diaz* V, Pet. App. A, A-9-13, A-23-25 *with Diaz* III, Pet. App. D, A-88-91, *and Diaz* I, Pet. App. F, A-140, A-155. The examination of the duty under state law to desegregate also shows careful attention to the record by the Court of Appeals. *Compare Diaz* V, Pet. App. A, A-9-13, with *Diaz* III, Pet. App. D, A-93-95, and *Diaz* I, Pet. App. F, A-143-145. Petitioners' bald assertion that the Ninth Circuit "repeatedly leapt to conclusions that were either unjustifiable in light of all the evidence, or that were actually negated by specific findings of the District Court", Pet. at 22, is completely unsupported by the opinions of the courts below.

The argument is made by petitioners that the Ninth Circuit *must* have ignored the trial court's conclusion that school siting for the Field Act schools was done on the basis of the neighborhood school policy. Pet. at 23. To the contrary; the Ninth Circuit addressed this clearly erroneous conclusion of the trial court at *Diaz* V, Pet. App. A, A-21, and noted that "[n]one of these decisions was required by the neighborhood school policy." *Id.*

However, the petition fails to mention a number of relevant facts regarding the siting of schools. The district court itself felt that the decisions concerning the rebuilding of the Field Act schools presented "[p]erhaps the most disturbing evidence facing the court." *Diaz* III, Pet. App. D, A-71.

The decision was made to rebuild three schools on their old sites despite recommendations to do otherwise from a Board member and consultants hired to advise on improving racial imbalance. *Diaz* III, Pet. App. D, A-71-72, *Diaz* V, Pet. App. A, A-17.

Further, the Board assured the State that the rebuilding of schools would be used to reduce ethnic imbalance. *Diaz* V, Pet. App. A, A-17-18. Although the Spanish-surnamed community wanted three of the schools rebuilt on the same sites, there was also opposition to the reconstruction of these schools. *Diaz* I, Pet. App. F, A-124.

Here again, an examination of the Ninth Circuit's opinion shows it was well aware of the record in this case.

C. To accept petitioners' argument is to hold that a reviewing court can never examine the correctness of conclusions determined from undisputed underlying facts.

As discussed above, the Ninth Circuit was obviously aware of the constraints imposed by Rule 52(a). The rule

was cited, and the clearly erroneous standard quoted early in the opinion. *Diaz* V, Pet. App. A, A-5-6.

Petitioners note correctly that Rule 52(a) requires appellate courts to defer to the findings of trial courts. However, this duty of deference is not in addition to the clearly erroneous standard, but is part and parcel of that standard. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1979), and *Dayton*, 443 U.S. at 534 n. 8.

Furthermore, the Ninth Circuit did not take issue with the historical facts as established by the trial court, but only with the inferences to be drawn from those facts. *Diaz* V, Pet. App. A, A-6. Thus, the conviction of mistake did not rest upon a perception by the appellate court that the underlying facts were different from those found by the trial court. Simply put, the Ninth Circuit, after giving the trial court's findings the appropriate deference, could not agree with the ultimate finding—the absence of segregative intent.

A comparison of the opinions of the district court and the opinion of the Ninth Circuit in *Diaz* V reveals that the appellate court was aware of both the record and the bases of the trial court's conclusions. This is not a case where the findings were overturned merely because the appellate court thought too little weight was ascribed to the evidence. Neither did the Court of Appeals here fail to show any bases for its conclusions, nor misunderstand the bases for the trial court's conclusions. *Compare Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. at 855, 856 n.17, 857 n.18.

Rather, the Ninth Circuit has taken great pains to examine the evidence in the record as well as the district

court's findings, with the result that the appellate court was firmly convinced that the trial judge had made a mistake. *Diaz* V, Pet. App. A, A-6. The following examples are not exhaustive.

The trial court concluded that even though the racially-based faculty assignments in the District were illegal, *Diaz* III, Pet. App. D, A-91, they were not reflective of segregative intent because there was no evidence of segregative effect thereby on the students, *Diaz* III, Pet. App. D, A-92, and because the assignments were for a "benign purpose". *Diaz* III, Pet. App. D, A-93. The Ninth Circuit clearly understood the basis for the trial court's conclusion, but differed with the lower court as to the *logical effect* of the facts. *Diaz* V at Pet. App. A, A-19-20.

With respect to the double sessions utilized by the District to relieve overcrowding, the trial court found no inference of segregative intent, even though double sessions were recognized as being educationally disadvantageous, *Diaz* III, Pet. App. D, A-81, and thus difficult to justify merely on the basis of a neighborhood school policy. The Ninth Circuit reasoned that the use of double sessions had probative value, especially in light of the Board's willingness to depart from its neighborhood school policy and allow transfers outside of attendance areas from crowded schools at the behest of Anglo parents. *Diaz* V, Pet. App. A, A-19-21.

One of petitioners' examples of the Court of Appeals' "lack of deference", Pet. at 25, to the findings of the trial court is the Ninth Circuit's finding that petitioners' failure to comply with their affirmative duty to desegregate inferred segregative intent. Pet. at 26. Petitioners argue,

illogically, that such a refusal to comply with law must have been motivated by segregative intent or by a desire to adhere to the neighborhood school policy. The Ninth Circuit found that petitioners must have been "motivated, at least in part, by a desire to avoid desegregation rather than a sincere commitment to the educational benefits of neighborhood schools." *Diaz* V, Pet. App. A, A-13. The Ninth Circuit need not have concluded, and clearly did not conclude, that petitioners were motivated *solely* by segregative intent. Although the appellate court did not draw the same inference as the trial court, the inference of segregative intent was clearly permissible. This is simply another instance where the Ninth Circuit agreed with the underlying facts, but was forced to draw a different inference. (In the proper case failure to act in a manner required by law may provide direct evidence of segregative intent. *See Columbus*, 443 U.S. at 462 n. 11.)

Petitioners also see a lack of deference in the view taken by the Ninth Circuit of the Board's representations as to the effect of proposed bond issues. The Ninth Circuit found that any doubt of the Board's segregative intent was dispelled by the Board's statements reassuring the public that bond issue funds could not be used for busing; but that busing would be necessary to relieve overcrowding if the bonds did not pass. *Diaz* V, Pet. App. A, A-26-27. The trial court, on the other hand, while recognizing that "the repeated assurances . . . that no funds would subsidize busing may have assured voters who feared forced integration", *Diaz* I, Pet. App. F, A-155, decided (clearly erroneously) that where there was no affirmative constitutional obligation to bus, no segregative intent could be inferred from the representations. *Id.*

The district court applied the same type of reasoning to its analysis of the Board's response to QUEST. The District represented to the State Department of Education that progress was being made on the imbalance problem through QUEST. *Diaz* I, Pet. App. F, A-147. But in spite of the fact that the Board was "less than supportive" of QUEST, *Diaz I*, Pet. App. F, A-155, and the fact that none of QUEST's proposals was ever adopted, *Diaz* I, Pet. App. F, A-147, the trial court concluded that no segregative intent could be implied because the board had no affirmative duty to integrate. *Diaz* I, Pet. App. F, A-155.

The proper way to view evidence going to the issue of segregative intent is as a *whole*. As the above discussion shows, and the Ninth Circuit held, the trial court failed to consider the *cumulative* impact of the evidence in this case. *Diaz* V, Pet. App. A, A-28, citing *Washington v. Davis*, 426 U.S. 229, 242 (1976), *Arlington Heights*, 429 U.S. at 266-268, *Flores v. Pierce*, 617 F.2d 1386, 1389 (9th Cir., 1980), *cert. denied*, 449 U.S. 875 (1980). The question is not whether each piece of evidence alone points to segregative intent, but whether it is likely that all the relevant acts together would have occurred in the absence of segregative intent.

D. This case is not appropriate for Supreme Court review since the clearly erroneous standard would not thereby be further explained.

This Court has just recently made clear that determinations of discriminatory intent are subject to the clearly erroneous standard of Rule 52(a). *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Because the Ninth Circuit

recognized and complied with that standard, there is no need to review this record yet again.

It bears repeating that the Ninth Circuit cited both Rule 52(a) and *Pullman-Standard* early in its opinion. *Compare Pullman-Standard,* 456 U.S. at 290 *with Diaz* V, App. A, A-5. The Ninth Circuit properly considered the cumulative weight of the evidence, and found that "[a]n inescapable conclusion that the Board intended segregation" emerged, *Diaz* V, Pet. App. A, A-30. A remand to correct any error of the district court in *not* considering the cumulative weight of the evidence would serve no purpose because as the Ninth Circuit has noted, there could be only one result. *See Pullman-Standard,* 456 U.S. at 292.

In fact, the granting of this petition would merely lead to a factual determination by this Court as to whether *this* district court was or was not clearly erroneous. To do so would not further delineate the bounds of Rule 52(a) or the clearly erroneous standard in any respect. Thus, the result would be of interest only to the parties here.

IV. This Court's Limited Resources Should Not Be Expended On This Case.

A. No new legal principles are likely to emerge.

Petitioners' three "Questions Presented" have been dealt with above. The first question, whether an inference of segregative intent arises "as a matter of law" when decisions consistent with a neighborhood school policy have the foreseeable and foreseen result of maintaining and exacerbating ethnic imbalance, has been answered by the Ninth Circuit in its previous opinions. The (obvious)

answer, and one consistent with this Court's prior decisions, is simply—"it depends." It depends on the totality of relevant facts and circumstances. Within the peculiar facts and circumstances of this case, the answer is yes. In a different case, the answer could be no. This Court would neither be making new law nor would it be clarifying any confusion as to existing law if it granted the petition as to this issue.

Petitioners' second "Question" should not serve as a vehicle for granting the writ, inasmuch as *this Court is being asked to rule upon a legal proposition not even presented in this case.* The Ninth Circuit did not hold that local school boards are forbidden from making decisions with foreseeable and foreseen segregative impact; indeed, the court made clear that such decisions have no constitutional significance "one way or the other" absent an examination of everything else going on within the District. *Diaz* V, Pet. App. A, A-7, *see Diaz* II, Pet App. E, A-108, The answer to petitioners' second issue is simply "no." This is already the law.

Finally we have petitioners' third "Question." This court is simply being asked to review whether the Ninth Circuit correctly analyzed the district court's decisions consonant with the mandate of Rule 52. As has been discussed above, this Court's recent decision in *Pullman-Standard v. Swint,* was cited and used by the Ninth Circuit as the controlling case, and the Ninth Circuit performed its analysis consistent with this precedent. (Indeed, the dissenting Judges did not disagree with the Rule 52(a) analysis, although they disagreed with the result.) Even if the Ninth Circuit reached the wrong result in this

case (which it did NOT), the case should not be reviewed for this reason alone.

B. A review would necessitate reexamination of a voluminous factual record.

Petitioners themselves note that a review of this case would involve reexamination of a trial transcript by their calculation exceeding 1400 pages in length. Pet. at 22. Indeed, the reporter's transcript exceeds 1600 pages and the clerk's transcript occupies 1000 pages; thus, exclusive of exhibits, the record exceeds 2600 pages.

The decision to grant a writ should not be made merely to review the peculiar facts of this particular piece of litigation.

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CONCLUSION

The petition for a writ of certiorari presented by the San Jose Unified School District consists of a number of "red herrings" designed to interest this Court in areas appropriate for the exercise of its discretionary jurisdiction. An analysis of the Ninth Circuit opinion under attack shows, however, exactly how specious petitioners' arguments are. The Ninth Circuit is not about to deal a killing blow to the concept of neighborhood education; it clearly has a better grasp of the relevance of a neighborhood policy in school desegregation litigation than do petitioners.

Likewise, the Ninth Circuit's analysis of the district court's decision is unobjectionable—the ultimate fact of

segregative intent was established with the clearly erroneous standard of review in conformance with the mandate of *Pullman-Standard v. Swint.*

We have come full circle to what this case has always been about—whether the acts and omissions of the San Jose Unified School District, under all the surrounding facts and circumstances, were undertaken with segregative intent. Two-thirds of the FIFTEEN appellate judges who have already wrestled with the case have concluded the answer is a clear and convincing "yes."

But this is not enough for petitioners, who wish for one more bite of the judicial apple, while, ironically, and absurdly, arguing that this Court should strike down the Ninth Circuit's opinion as "an invitation to litigants to appeal, and to keep appealing, until their (or their opponents') resources are exhausted." Pet. at 26-27.

The district court itself noted that "[c]ontinued failure to choose the path which leads towards less ethnic imbalance in the schools could well, at some future time, form the basis for a conclusion that the school officials do, in fact, wish to keep the Anglos and the Spanish-surnamed students segregated in the SJUSD." *Diaz* III, Pet. App. D, A-99. The Ninth Circuit determined that the conclusion must be made now.

It is time, after thirteen years of litigation on the liability issue alone, for the parties, under the watchful eye of the district court, to begin the productive and creative task of fashioning a remedy which simultaneously eradicates segregation, is educationally sound, and to the extent humanly possible, has community support.

For the foregoing reasons, the petition for a writ of certiorari must be DENIED.

Respectfully submitted,

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